

103 KAR 26:120. Advertising agencies.

RELATES TO: KRS 139.010, 139.200, 139.260, 139.270, 139.280, 139.310, 139.330, 139.470, 139.480, 139.495

STATUTORY AUTHORITY: KRS 131.130, 139.710

NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130(1) and 139.710 authorize the Department of Revenue to promulgate administrative regulations for the assessment, collection, refunding, administration, and enforcement of the Kentucky tax laws. This administrative regulation establishes requirements and guidelines for the application of sales and use tax to purchases and sales of tangible personal property and digital property by advertising agencies.

Section 1. Definitions. (1) "Advertising agency" means a business engaged primarily in the professional service of developing strategy, concept, and design for the placement of advertising on radio or television stations, or in newspapers, magazines, or other media.

(2) "Advertising services" means all advertising agency activities involved in the conceptualization, development, production, and refinement of a master advertisement prior to its reproduction by the advertising agency or a third party including creative concept development, design, layout, consultation services, research, script and copy writing, art preparation, public relations, and account management services.

(3) "Master advertisement" means the original advertising material created by the advertising agency for reproduction as tangible personal property or digital property for the purpose of display or other advertising uses, such as master commercials, camera ready art, proofs, and corporate logos.

Section 2. Advertising Agencies as Consumers in Creation of Master Advertisement. (1) An advertising agency shall be the consumer of all tangible personal property and digital property used in the performance of its advertising services to produce a master advertisement regardless of whether the property the agency purchases is acquired in the name or account of the advertising agency or its client. The tax shall apply to the advertising agency's purchase of:

(a) All tangible personal property or digital property for use in the performance of its advertising services, including the purchase or rental of stock photos and movie footage delivered as tangible personal property or digital property;

(b) Any materials that become a component of the master advertisement; and

(c) Any tangible personal property or digital property that is incidentally provided to the client as part of the advertising services.

(2) An advertising agency shall not claim that its purchase of tangible personal property or digital property is exempt from sales and use tax because the property is to be used in fulfilling a contract with:

(a) The federal government, state government, or political subdivision thereof;

(b) Any department, agency, or instrumentality of the federal government, state government, or political subdivision thereof; or

(c) A religious, educational, or charitable institution exempt from tax under KRS 139.495.

(3) The performance of advertising services shall not constitute manufacturing or processing production of tangible personal property or digital property for sale. Therefore, an advertising agency shall not claim that its purchase of tangible personal property or digital property used in the performance of its advertising services is exempt from sales and use tax under the:

(a) Raw material, industrial tool, and industrial supply exemption as provided in KRS 139.470(9); or

(b) The machinery for new and expanded industry exemption as provided in KRS

139.480(10).

(4) If acting in the capacity of a consumer, an advertising agency shall not bill its client for tax on charges made for advertising services.

Section 3. Advertising Agencies as Retailers After Creation of Master Advertisement. (1) An advertising agency shall be a retailer of tangible personal property and digital property the advertising agency sells to its clients or to others on behalf of its clients regardless of whether the sale is at a marked-up price. This provision shall include property reproduced from a master advertisement whether the advertising agency or a third party actually reproduces the materials. This provision shall not include property described in Section 2(1) of this administrative regulation that the advertising agency uses in creating a master advertisement.

(2) An advertising agency engaged in business as a retailer shall:

(a) Complete a "Kentucky Tax Registration Application", Revenue Form 10A100, to register with the Department of Revenue for a retail sales and use tax permit; and

(b) Report and pay the applicable sales or use tax utilizing Revenue Form 51A102, "Sales and Use Tax Return".

(3) Taxable receipts from an advertising agency's retail sale of tangible personal property or digital property shall include all charges for services that are a part of the sale of tangible personal property and digital property including charges for:

(a) Inbound freight;

(b) Production supervision; or

(c) Print management that directly relate to the sale of particular tangible personal property.

(4) Gross receipts subject to sales tax shall not include periodic print management fees or other retainer fees not related to the sale of particular tangible personal property or digital property and paid whether or not there is a transfer of tangible personal property or digital property in a given fee period.

(5) An advertising agency may purchase tangible personal property and digital property it sells to or for its clients as a sale for resale without payment of the tax if the advertising agency:

(a) Provides to its suppliers a properly completed:

1. Kentucky "Resale Certificate", (Revenue Form 51A105);

2. Multistate Tax Commission (Uniform Sales and Use Tax Certificate Multijurisdiction);

3. Streamlined Sales and Use Tax Agreement – Certificate of Exemption (Revenue Form 51A260); or

4. Other documentation containing the information required by KRS 139.280; and

(b) Reports and pays the applicable sales or use tax on their sales of the tangible personal property, digital property, and services included in KRS 139.200 utilizing Revenue Form 51A102, "Sales and Use Tax Return".

Section 4. Joint Activities by Advertising Agencies. (1) If an advertising agency contracts with a client to provide both advertising services and the sale of tangible personal property or digital property, receipts subject to tax shall be determined by the following guidelines if the charges for the advertising services are clearly delineated from the charges for the tangible personal property or digital property on the customer's invoice.

(a) Any transfer of tangible personal property or digital property for a consideration, other than the master advertisement and the items described in Section 2(1) of this administrative regulation used in the creation of the master advertisement, to a client or a third party on behalf of a client shall be considered a retail sale of tangible personal property or digital property subject to sales tax.

(b) Receipts from agency fees, service charges, or commissions exclusively for advertising services shall not be subject to sales tax, including charges for placing advertisements in print, broadcast, or other media.

(c) The amount separately stated for the tangible personal property or digital property shall not be less than the fair market value of similar property sold in a similar transaction not involving the provision of advertising services.

(2) If an advertising agency contracts with a client to provide both advertising services and the sale of tangible personal property or digital property and does not clearly delineate the charges on the customer's invoice, the total billing amount shall be subject to tax.

Section 5. Forms. The forms listed herein may be inspected, copied, or obtained, subject to applicable copyright law, at:

(1) The Kentucky Department of Revenue, 501 High Street, Frankfort, Kentucky 40601;

(2) At a Kentucky Taxpayer Service Center during business hours; or

(3) On the department Web site at <http://revenue.ky.gov>. (30 Ky.R. 1702; 1904; eff. 2-16-2004; 44 Ky.R. 1097, 1494; eff. 2-2-2018; Crt eff 1-28-2020; 46 Ky.R. 1920, 2389; eff. 6-2-2020.)